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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND CO., GEORGE KING, AND GROVER C. GOODE,
Respondents.

On Petition for Writ Of Certiorari To The Supreme Court Of Appeals of West Virginia

BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose approximately 60,000 members primarily represent those who have suffered personal injury, deprivation of civil rights, or economic harm as a result of tortious misconduct. This Court determination of whether the common-law method of assessing punitive damages violates due process will have a significant impact on the rights of plaintiffs.

Trial lawyers recognize that justice in America is administered, in large part, by the American people themselves. The jury is a distinctively democratic institution, reflecting the common sense and conscience of the community, beholden to no personal ambition, economic interest, or political constituency. The value of the independent jury is reflected in the array of special interests which have mounted an intense and heavily financed campaign to undermine its role under the guise of "tort reform." The heart of the challenge to punitive damages in this case is an attack on the jury.

ATLA therefore respectfully submits this brief as amicus curiae. The written consents of both parties have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

In this case, the Court is once again invited into the controversy surrounding punitive damage awards in civil lawsuits. The central issue is clear and relatively narrow: May the states continue to employ the common-law rule that the amount of punitive damages is to be determined by the jury, within the proper exercise of its discretion and based on the evidence in the particular case. Or must judges reexamine each jury verdict and reduce the award of punitive damages to meet a standard of proportionality based on a variety of mathematical and policy factors.

The focus of attack is the very cornerstone of our civil justice system: the jury. In a peculiar inversion of the familiar values this Court has associated with the Fourteenth Amendment, the most powerful interests in society seek relief from "oppression" -- not by government, but by the institution which the common law has devised as a check against the power of government.

This Court has recently held that the common-law method of assessing punitive damages comports with due process. Reliance upon the proper exercise of jury discretion to determine the appropriate measure of punitive damages has enjoyed longstanding acceptance at common law and by this Court. Moreover, jury discretion furthers important state interests embodied in substantive tort law.

The imposition of constitutional limits on the magnitude of punitive damage awards in state tort cases as a matter of substantive due process would require this Court to resurrect the doctrine of substantive due process scrutiny of economic regulation, an activist doctrine that the Court has firmly and wisely rejected. Nor has Petitioner established a compelling need to impose substantive limits on jury discretion. The common law itself provides ample protection against excessive punitive awards. Empirical studies demonstrate that the purported "explosion" of large punitive damage awards is little more than a myth.

Substantive limits on punitive damage awards in state cases run counter to the values of federalism. The proportionality standard authorizes judges, and ultimately this Court, to substitute their own views of the seriousness of violations of state substantive law for those of the states. Moreover, imposing such a limit effectively overrules the decisions of the great majority of state legislatures which have chosen not to enact substantive limits on punitive damages.

The strongest indication that jury discretion does not offend due process is the Seventh Amendment prohibition against courts reexamining jury findings except as provided by common law. Indeed a number of state courts have found legislative caps on damages violative of state constitutional guarantees of the right to trial by jury. It is sufficient in this case that this explicit constitutional guarantee is a clear indication that due process does not *require* courts to reduce jury verdicts on the basis of a proportionality standard.

Nor does the Due Process Clause require the adoption of a detailed scheme of procedural requirements in punitive damage cases. The rule in West Virginia and the majority of states that the jury may consider evidence of defendant's wealth is rationally related to the state's objectives in imposing punitive damages. With respect to other proposed procedures, the Due Process Clause does not require a particular code of procedures. This Court's opinion in *Haslip* did not depart from that position.

ARGUMENT

I. THE COMMON-LAW METHOD OF ASSESSING PUNITIVE DAMAGES BY RELYING ON THE DISCRETION OF THE JURY COMPORTS WITH DUE PROCESS.

The central question before this Court is whether American juries, after 200 years of accepted practice, shall be stripped of their responsibility for assessing the appropriate measure of punitive damages in civil cases. Instead, shall judges and appellate courts reexamine each award to determine whether it exceeds the constitutional maximum, as defined by this Court? Petitioner TXO contends that the common-law method of entrusting this determination to the broad discretion of juries violates the Due Process Clause. On that basis, Petitioner and numerous supporting amici urge this Court to impose substantive limits and more stringent procedural requirements on punitive awards.

Amicus submits that the Due Process Clause cannot support such a drastic intrusion by this Court into a field traditionally occupied by the states. The course Petitioner charts for this Court demands the rejection of fundamental principles that this Court has vigorously defended: the role of this Court in reviewing economic regulation, the role of the states in advancing important public policies through

substantive tort law, and the role of the jury in the civil justice system.

A. Reliance Upon Jury Discretion To Assess Punitive Damages, Historically Recognized At Common Law, Widely Practiced By American Courts, And Consistently Acknowledged By This Court, Comports With Due Process.

Petitioner, with the support of numerous amici, invites this Court to author a new volume of constitutional law: The federal constitutional law of punitive damages. TXO urges this Court to begin this work by declaring that the common-law method of assessing punitive damages, which relies upon the jury to determine the amount within the proper exercise of its discretion, violates due process of law. Jury "discretion," in this context, authorizes the jurors to determine the amount appropriate to punish and deter the specific misconduct, based on all the circumstances of the case and on the law provided in the judge's instruction.

TXO proposes that judges, and ultimately this Court, be the ultimate factfinders with respect to the amount of punitive damages awards. Judges, and ultimately this Court, would reexamine each jury verdict and adjust the amount of punitive damages based on a proportionality standard informed by mathematical comparisons to other awards and upon the judge's own evaluation of the harm to be punished and deterred. This standard, TXO expects, will deliver defendants from painfully high punitive damages awards.

The constitutional issue raised by TXO's proposal is indistinguishable from that addressed by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). Prior to that decision, the Court had "never addressed" the issue of "whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit." *Id.* at 1039. The Court squarely rejected the notion of a "mathematical bright line," of constitutionality, *Id.*

at 1043, and held that the common-law method of assessing punitive damages does not deny due process *Id.*

Nevertheless, TXO and supporting amici seize upon the *Haslip* Court's remark that the ratio of punitive to compensatory damages in that case "may be close to the line," *Id.* at 1046, as holding out the promise that there is some limit beyond which juries may not award punitive damages [1] Brief of Petitioner at 12 In addition, they advise the Court that the premise of *Haslip* -- that procedural safeguards are sufficient to ensure fundamental fairness, is "doubtful." *Id.* at 11 *See also,* Brief for the American Tort Reform Association at 4 (the constraints recognized in *Haslip* "have of not abated the flow of 'staggering' judgments.")

Petitioner therefore submits a substantive upper limit to awards in the form of a proportionality test The wisdom and practicality of this standard are both questionable and irrelevant The sole constitutional issue before this Court is whether punitive damage awards in the absence of such a substantive limit violate the Due Process Clause TXO's proposal to this Court is constitutionally indistinguishable from Pacific Mutual's and should similarly be rejected

The Due Process Clause does not enumerate the basic elements of fundamental fairness Nor, however, is a policy mandated by the Constitution merely because it is "enlightened and wise." *Lassiter v. Department of Social Services,* 452 U.S. 18, 34 (1981). Were that the case, fundamental fairness would be reduced to no more than the personal "predilections" of judges, or Justices. *Moore v. City of East Cleveland,* 431 U.S. 494, 503 (1977). Instead, "history and widely shared practice [are] concrete indicators

[1]Out of context, the Court's remark is somewhat puzzling. However, a fair reading of the remark in the context of the preceeding discussion might be that the magnitude of the award warranted inquiry into whether the defendant was actually afforded the protections provided by state law to confine jury discretion to proper purposes.

of what fundamental fairness and rationality require." *Shad v. Arizona,* 111 S. Ct. 2491, 2501 (1991) [2]

The Due Process Clause receives its meaning the specific guarantees set forth in the Bill of Rights and from "what history teaches are the traditions from which [this country] developed as well as the traditions from which it broke." *Moore, supra,* at 502, quoting *Poe v. Ullman,* 367 U.S. 497, 542 (1961)(Harlan, J., dissenting) Specifically, this Court has long held that, in large measure, the common law defines due process In ascertaining what process is due,

> We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country

Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276-77 (1856)

More recently, Justice Powell reemphasized this view that the drafters of the Due Process Clause intended to give Americans "the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit

[2]TXO's reliance upon *Shad,* Brief of Petitioner at 15, is misplaced Due process is informed by the historical and contemporary practices and procedures afforded by the justice system, not by the range of verdicts or awards

The *Shad* Court rejected defendant's contention that jury instructions which did not require the jurors to agree on either premeditation or felony-murder as the basis for their first-degree murder verdict denied him due process Even in this capital murder case, the plurality emphasized the limited role of the Due Process Clause in rewriting state law. "We do not, of course, suggest that jury instructions requiring greater specificity are not desirable. . . We hold only that the Constitution did not command such a practice in this case." 111 S. Ct. at 2501.

of happiness by free men'" *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). Under this view "the fourteenth amendment encompasses the same liberties as those protected by the common law." *Id.* at 679 n.47.

The practice of awarding punitive damages was, of course, well recognized at common law prior to the drafting of the Constitution. *Browning-Ferris Indus. v. Kelco Disposal Inc.*, 109 S. Ct. 2909, 2919 (1989). Of particular significance is the historical acceptance of the principle of jury discretion as an integral part of the very definition of punitive damages. *Id.* at 2920 n.20, quoting Lord Camden's upholding "exemplary damages" based on the jury's discretion in determining the amount of damages in tort actions in *Huckle v. Money*, 2 Wils. 206, 95 Eng. Rep. 768 (K.B. 1763). *See* L. Schlueter & K. Redden, Punitive Damages 6-9 (2d ed. 1989)("Lord Camden's recognition of the jury's unfettered discretion in awarding damages was firmly rooted in English legal tradition.")

Prior to the Fourteenth Amendment, this Court recognized that punitive damages were "a well established principle of the common law" in which the determination of the amount "has always been left to the jury, as the degree of punishment to be inflicted must depend on the peculiar circumstances of the case." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). The Court later noted that the common-law remedy of punitive damages was widely accepted by the states, and that "nothing is better settled than that, in such cases . . . it is the peculiar function of the jury to determine the amount by their verdict." *Barry v. Edmunds*, 116 U.S. 550, 565 (1886).

This Court has in the past reviewed the magnitude of statutory penalties under the Due Process Clause. *Missouri Pacific Ry. v. Humes*, 115 U.S. 512, 523 (1885)(double-damage penalty upheld); *Minneapolis & St. Louis Ry. v. Beckwith*, 129 U.S. 26 (1889)(same); *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340, 351 (1913); *Waters-Pierce Oil Co. v.*

Texas, 212 U.S. 86, 111 (1909)(upholding $1.6 million penalty and cancellation of license to do business); *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340 (1913)($500 fine for violating rate ceiling excessive); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915)($100 per day fine excessive); *St. Louis, Iron Mountain & Southern Ry. v. Williams*, 251 U.S. 63, 67 (1919)(upholding $75 penalty for fare overcharge of 66 cents). However, this Court has never imposed substantive due process limits on jury awards. *Haslip* at 1039.

Even in those instances where the Court deemed large punitive awards harmful to substantial countervailing public policies, the Court protected those policies by addressing liability rules rather than imposing proportionality limits on the discretion of juries to fix the amount of damages. *See, Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974); *Electrical Workers v. Foust*, 442 U.S. 42, 50-51 (1979); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981).

Indeed the trust in the jury extends even to imposing the death penalty. As this Court stated in a capital punishment case,

> the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'build discretion, equity and flexibility into a legal system.'

McKlesky v. Kemp, 481 U.S. 279, 331 (1987).

The notion that remedies and procedures developed and applied by the common-law courts may themselves be inimical "to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968), is anomalous.[3]

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[3]It is possible that, following a dramatic change in circumstances or social values, what once conformed to notions of fairness may be seen to offend traditional notions of fair play and substantial justice. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). Such a case is not before this Court.

It is jury discretion, not judicial limits, which lays clear claim to historical pedigree

B. Jury discretion in assessing punitive damages furthers important state interests.

TXO complains that according broad discretion to juries in assessing punitive damages is fundamentally unfair because jurors are free to exercise bias and prejudice, Brief of Petitioner at 23, and because defendants receive no fair warning of the amount of damages that might be awarded prior to committing the misconduct Id at 47

The possibility of bias against corporate or out-of state defendants is present in jury verdicts generally, including those assessing compensatory damages finding liability The remedy is found in clear instructions to the jury, not limits on all awards Further, while there must be notice of what conduct is forbidden, a defendant is not entitled to advance notice of the amount of the penalty *Haslip* at 1046 n 12

More importantly, the relative unpredictability that comes with permitting jurors to tailor the measure of damages to the circumstances of the individual case serves important state interests *Tuttle v. Raymond*, 494 A 2d 1353, 1359 (Me 1985)("the lack of any precise formula by which punitive damages can be calculated is one of the important assets of the doctrine")

The purpose of tort law is to protect the health, property, economic rights and civil rights of citizens not only by compensating those whose rights are invaded, but also by punishing and deterring misconduct This is the very basis of the "fault" principle in tort law Cooter, *Economic Analysis*

The evil which TXO complains of, the possibility of arbitrary verdicts, has been a characteristic of the rule of jury discretion since its inception Moreover, there is no indication that society's notions of justice have so changed that entrusting important matters to juries is viewed as intolerable

of Punitive Damages, 56 So Cal L Rev 79, 137 (1982)("there is now a rich body of academic literature supporting the view that a primary purpose of tort liability rules is to discourage inappropriate behavior on the part of accident causers"), Morris, *Punitive Damages in Tort Cases*, 46 Harv L Rev 1173, 1177 (1931)(punitive damages merely increase the severity of the "admonitory" function of compensatory damages)

Compensatory damages alone are not adequate to achieve this goal In some situations, such as willful violations of civil rights, the harm may not be reflected in the compensatory award *Carlson v. Green*, 446 U S 14, 22 n 9 (1980)(in such cases, "punitive damages may be the only significant remedy") In other circumstances, such as fraud and bad faith, a defendant may view the misconduct as profitable due to the low probability of getting caught *See, e.g., Bankers Life & Cas. Co. v. Crenshaw*, 483 So 2d 254, 271 (Miss 1985)

In still other situations, notably product liability, a wrongdoer may be able to pass along the anticipated liability to consumers

> Compensatory damages are often foreseeable as to amount . . . . Anticipation of these damages will allow potential defendants, aware of dangers of a product, to factor those anticipated damages into a cost-benefit analysis and to decide whether to market a particular product The risk and amount of such damages can, and in some cases will, be reflected in the cost of a product, in which event the product will be marketed in its dangerous condition

Fischer v. Johns-Manville Corp., 103 N J 643, 664, 512 A.2d 466, 477 (1986), *see also Palmer v. A.H. Robins Co.*, 684 P.2d 187, 218 (Colo 1984)("If punitive damages are predictably certain, they become just another item in the cost of doing business") "Rather than remove dangerous products from the market, manufacturers may instead accept the risk of

paying limited punitive damages." *Leonen v. Johns- Manville Corp.*, 717 F. Supp. 272, 284 (D.N.J. 1989).

A well-known example is the Ford Pinto. An internal Ford memo anticipated that 180 people would be burned to death and another 180 severely injured by fuel-fed fires, and that the hazard could be eliminated for less than $11 per car. Ford management nevertheless determined that it was more profitable to pay damages than to fix the car. *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 813, 174 Cal. Rptr. 348, 384 (1981). *See also, Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. Ct. App. 1986).

In other words, predictable damages may cease to deter and become, in effect, the purchase price for a license to do harm.

Nor do criminal penalties provide the necessary punishment and deterrence. As this Court has noted, criminal fines are "often calculated without regard to the harm the defendant has caused," and may lack "precise deterrent effect." *Kelly v. Robinson*, 479 U.S. 36, 49 n.10 (1987). Illustrative again is *Grimshaw*:

> It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of defective products that punitive damages must be of sufficient amount to discourage such practices. Instead of showing that the punitive damage award was excessive, the comparison between the award and the maximum penalties under state and federal statutes and regulations governing automotive safety demonstrates the propriety of the amount of punitive damages awarded.

Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 820, 174 Cal. Rptr. 348, 389 (1981).

Not only has this Court recognized that punitive damages "have long been a part of traditional state tort law," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)(upholding a

$10 million punitive damage award), the Court has viewed punitive damages, including the discretion accorded to juries, as an important remedy in furthering federal interests. The Court explained in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981), that by "allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [42 U.S.C. 1983] directly advances the public's interest in preventing repeated constitutional deprivations." *See also Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980)("punitive damages may be the only significant remedy available in some §1983 actions where constitutional rights are violated but the victim cannot prove compensable injury.").

II. THIS COURT SHOULD NOT IMPOSE SUBSTANTIVE LIMITS ON JURY AWARDS OF PUNITIVE DAMAGES UNDER STATE LAW.

A. This Court Should Not Resurrect Substantive Due Process Review Of Economic Regulation

TXO opens its argument by advising this Court that the basic premise of its decision in *Haslip* -- that basic procedural safeguards are sufficient to assure fundamental fairness in punitive damage awards -- is "doubtful." Brief of Petitioner at 11. It is necessary, TXO argues, for this Court to establish "substantive constitutional limits" beyond which punitive damage verdicts may not go, regardless of the procedures used. *Id.* at 12.

At the outset, TXO fails to define the substantive limit it would have this Court impose. Mindful of this Court's instruction that there is no "mathematical bright line," TXO suggests four: (1) previous punitive damage awards in the same jurisdiction, (2) awards involving similar misconduct in other jurisdictions, (3) legislative penalties for similar

misconduct, and (4) the ratio to compensatory damages. *Id.* at 16. It is left to judges, and ultimately this Court, to "pick a number" in each case that indicates the point at which much becomes too much. Even then, "not all large punitive damage awards are constitutionally defective," and may be justified as reasonably necessary to punish and deter the misconduct. *Id.* at 32-33.

The substantive due process limit defined by petitioner is the point at which an award "exceeds the bounds of contemporary and historical practice by *orders of magnitude*, absent compelling and particularized justification." *Id.* at 21 (emphasis in original). Significantly, TXO does not indicate what the constitutionally permissible award would be in this case.

This Court cannot, of course, impose such a limit on state awards directly. "In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law." *Browning-Ferris, Indus. v. Kelco*, 109 S. Ct. 2909, 2922 (1989). TXO is therefore correct in its assumption that a standard can be imposed, if at all, only by resort to substantive due process, which forbids certain deprivations by the state regardless of the fairness of the procedures used. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

Few doctrines have been as firmly rejected by this Court, however, as the interference in economic regulation under the banner of substantive due process. Justice Holmes correctly admonished the Court that "the Constitution is not intended to embody a particular economic theory." *Lochner v. New York*, 198 U.S. 45, 75 (Holmes, J., dissenting). The Court's decision in *Lochner* to interpose its "economically correct" views under the guise of due process has been described as "one of the most ill-starred decisions that it ever rendered." W.

Rehnquist, The Supreme Court: How It Was, How It Is 205 (1987).

In the years following its unlamented end in *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937), the *Lochner* era has served as a reminder of the wisdom of "caution and restraint." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

This Court has been scrupulously cautious in rejecting invitations to resort to substantive due process, even in non-economic settings affecting personal liberties. *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986); *Deshaney v. Winnebago County Dept. of Social Services*, 109 S. Ct. 998, 1007 (1989). TXO offers no principled justification for resurrecting substantive due process scrutiny in economic matters solely for the benefit of litigants in private civil lawsuits.

B. Substantive Limits Are Not Essential to Fundamental Fairness.

1. Judicial Review Under Common Law Practice Provides Ample Protection Against Excessive Awards.

A feature of the common law of punitive damages is reliance upon judicial review to prevent excessive awards. *See*, Restatement (Second) of Torts §908, comment d (1979). Under the common-law standard, a verdict may be overturned where it was "so excessive . . . as to demonstrate that the jury have acted against the rule of law, or have suffered their passions, their prejudices, or their perverse disregard for justice to mislead them." *Barry v. Edmunds*, 116 U.S. 550, 565 (1886). The precise formulation and the factors weighed to ensure against excessive verdicts vary as matters of state law. *See generally* L. Schlueter & K. Redden, Punitive Damages §6.1B (2d ed. 1989). Nevertheless, "judicial scrutiny over the awards provides a partial justification for allowing such awards in the first place. The spectre of

bankruptcy and excessive punishment can be in part dispelled to the extent that trial and appellate courts exercise their powers of review." *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48 (Alaska 1979)

Indeed, defendants enjoy greater protection against large punitive awards than against large compensatory awards. For example, although many states permit a judge to order a new trial on the basis of inadequate compensatory damages, virtually all accept the view that additur does not apply to punitive damages. Courts may reduce, but not increase the jury's award. *Louisville & Nashville R.R. v. Street*, 164 Ala. 155, 51 So. 306 (1909), *Wangen v. Ford* Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980), *see* Note, 16 Cumberland L. Rev. 151, 158 (1985-86).

Another special protection is the well-settled rule that "Punitive damages should be painful enough to provide some retribution and deterrence, but should not be allowed to destroy the defendant." *Arab Termite & Pest Control v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982). *See also, Vasbinder v. Scott*, 976 F.2d 118, 121-22 (2d Cir. 1992)(financial condition of the defendant is to be taken into consideration so that a punitive award does not "result in the financial ruin of the defendant . . . or constitute a disproportionately large proportion of defendant's net worth."); *Olson v. Walker*, 781 P.2d 1015, 1021 (Ariz. App. 1989)(award "must not financially kill the defendant"); *Thiry v. Johns-Manville Corp.*, 661 P.2d 515, 518 (Okla. 1985)(similar). Compensatory damages are not so limited.

The accusation that courts are unable or unwilling to protect against excessive awards has no basis. If anything, "the court exercises much closer supervision over [punitive] awards than is the case with compensatory awards." *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 837 (Minn. 1988). *Accord, Home Insurance Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196, 203, 550 N.E.2d 930, 934 (1990); *Deal v. Byford*, 127 Ill. 2d 192, 537 N.E.2d 267, 272 (1989).

Commentators have noted a trend toward increased judicial scrutiny of punitive damage verdicts. *See* Ghiardi, *Punitive Damage Awards: An Expanded Judicial Role*, 72 Marquette L. Rev. 33, 43 (1988); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 44 (1982). And empirical studies indicate that courts frequently reduce or reverse punitive verdicts where appropriate. *See* M. Peterson, S. Sarma, M. Shanley, Punitive Damages: Empirical Findings viii (RAND Institute for Civil Justice 1987). A study of product liability verdicts found that courts reduce punitive damages to a greater extent than compensatory awards. U.S. General Accounting Office, Product Liability: Verdicts and Case Resolution in Five States 47 (Sept. 1989); M. Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts 32 (1991)(in over half of all product liability punitive damage verdicts appealed, the punitive award was reversed or reduced).[4]

2. The Frequency and Amount of Punitive Damage Verdicts Do not Warrant Constitutional Action.

The sole justification offered by TXO for reversing this Court's holding that jury discretion in assessing punitive damages does not offend due process is that only "Modest and measured punitive awards were familiar to the Framers of the Constitution and the Fourteenth Amendment." Brief of Petitioner at 33, citing Brief of American Tort Reform Association as Amicus. The ATRA brief expands upon this

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[4]This fact does not necessarily indicate that the jury's initial award was wrong. In some states, evidence of the defendant's wealth is not placed before the jury. Evidence that the defendant has been held liable for similar conduct in other cases is generally excluded so as to protect defendant from unfair prejudice. Adjustments in the amount of punitive damages based on these factors are reserved for judicial review.

point, as do other amici, denouncing a purported "continuing upward spiral" of "staggering" awards. Focusing specifically on product liability cases, ATRA contends that this increase threatens useful products and research in such fields as pharmaceuticals. Brief of ATRA at 4-6.

Setting aside the dubious proposition that increasing jury awards necessarily indicates something is wrong with juries,[5] recent empirical studies show that this "explosion" is little more than a myth.

If unrestrained jury sympathy for plaintiffs and bias against corporate defendants were indeed causing an explosion in punitive damage verdicts, it would be most evident in personal injury, especially product liability verdicts. This is not the case. The Institute of Civil Justice at the Rand Corporation, which is funded primarily by business and insurance interests, examined some 17,000 civil jury trials in Cook County and San Francisco County during 1960-84. The researchers concluded that "Punitive damages were rarely awarded in personal injury cases and there is little evidence that frequency has increased significantly." The study also found that most punitive damage awards remained fairly modest." M. Peterson, S. Sarma, M. Shanley, Punitive Damages: Empirical Findings 65 (RAND Institute for Civil Justice 1987). The study found that punitive awards had increased in cases involving business and contract torts, which the researchers did not attribute to jury discretion, but to recent developments in insurance bad-faith law and an increasing tendency for businesses to sue each other. *Id.*[6]

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[5]No one would seriously argue, for example, that the increase in convictions for drug offenses warrant imposing limits on the ability of juries to return guilty verdicts.

[6]An American Bar Association study examined the Rand data and concluded that:

> contrary to the common perception, punitive damages awards are neither routine nor routinely large, especially in personal injury cases including product liability and malpractice litigation. While punitive damages awards have grown in frequency and size over the past 25 years, the bulk of this growth has been in cases of intentional torts, unfair business practices or contractual bad faith. The punitive damages picture in personal injury cases has changed very little in 25 years. Moreover, while the size of punitive damages awards has increased, most are moderate in amount and the ratio of punitive to compensatory damages is generally not excessive.

Report of the Special Committee on Punitive Damages, Punitive Damages: A Constructive Examination 2-1 (ABA 1986).

In the specific area of products liability, an empirical study of reported decisions indicated that punitive damages are so infrequent as to be of "relative insignificance." W. Landes and R. Posner, The Economic Structure of Tort Law 304-06 (1988). The U.S. General Accounting Office found that "Large punitive damage awards that were disproportionate to compensatory damages occurred in only a few cases," and were likely to be reduced by judicial review. GAO, Product Liability: Verdicts and Case Resolution in Five States 31 & 47 (Sept. 1989).

The most extensive analysis of punitive damage verdicts, covering 47 counties in 11 states, has been completed by Stephen Daniels and Joanne Martin for the American Bar Foundation. They found that:

> Punitive damages were awarded infrequently, and when they were awarded the amount was typically modest. . . . Furthermore, plaintiffs were least likely to be awarded punitive damages in a case involving physical harm -- even if that case involved medical malpractice or products liability.
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> The punitive damage rates for physical harm cases, including the high visibility areas of medical malpractice and products liability, were extremely low throughout the 19 years [1970-1988]. Furthermore, the typical punitive damage award remained modest.

S. Daniels and J. Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 43 & 61-62 (1990).

A recent study conducted under the auspices of the Roscoe Pound Foundation of virtually all punitive damage verdicts in products liability cases from 1965 to 1990 found that juries had awarded punitive damages in only 355 cases M Rustad, Demystifying Punitive Damages in Products Liability Cases A Survey of a Quarter Century of Trial Verdicts 23 (1991) While virtually all the cases involved serious injury or death, *Id.* at 30, the median punitive award was $625,000 *Id.* at 29 Significantly, in over three-fourths of the cases studied, the manufacturer undertook some action to improve product safety *Id.* at 39

"There is surprisingly little evidence," states a highly significant study, "that liability currently hinders international competitiveness " P Reuter, The Economic Consequences of Expanded Corporate Liability 37 (RAND 1988) One reason is that total product liability costs (of which punitive damages are a small fraction) add a relatively small amount to the price of the product -- less than 1% for the vast majority of companies, according to a broad survey of the risk managers of American manufacturers Weber, *Product Liability: The Corporate Response* 13 (The Conference Board, 1987), Reuter at 45

It is also worth noting that foreign importers are subject to the same punitive damage laws For example, Honda, which makes one of the largest selling cars in the U.S., was held liable for compensatory and punitive damages in *Dorsey v. Honda Motor Co.*, 673 F 2d 911 (5th Cir 1982)($5 million punitive award based on evidence that the Honda knowingly marketed unsafe automobile) Potential liability for punitive damages, however, does not appear to be discouraging foreign manufacturers from competing in the U S market

Another argument raised by advocates of limits on punitive damages is that the threat of large awards is having a detrimental effect on research and development of useful products such as prescription drugs *See, Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S Ct 2909, 2924

(1989)(O'Connor, J., dissenting) (citing to Brief of Pharmaceutical Manufacturers Association as Amicus Curiae) The reality is that American companies are spending vast sums to develop new medicines *See,* "Companies Search For Next $1 Billion Drug," New York Times, Nov 28, 1988, at D1 PMA itself announced in a series of advertisements in the national media that research and development by U.S. pharmaceutical firms has "doubled every five years since 1970," and "Nearly half of the new medicines that achieved worldwide acceptance over a 12-year period originated in the United States." The series, "Innovations In Medicine," appeared in The Washington Post, Nov. 17, 1989

Recently PMA announced that the prescription drug industry is investing a record $12.6 billion in research and development of new drugs in 1993 PMA's advertisement appeared in Wall Street Journal, March 2, 1993, at B5 and in other major newspapers

C. Substantive Limits on Punitive Damage Awards Run Contrary to the Role of the States in our System of Federalism

1. Federal Limits On Punitive Damage Awards Interfere With State Enforcement Of Policy Goals.

This case, also, is about federalism *Coleman v. Thompson*, 111 S Ct 2546, 2552 (1991) Justice O'Connor's compelling defense of our system of federalism is particularly applicable in this case

> The federalist structure of joint sovereignty preserves to the people numerous advantages It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society, it increases opportunity for citizen involvement in democratic processes, it allows for more innovation and experimentation in government, and it makes government more responsive by putting the States in competition for a mobile citizenry

Gregory v. Ashcroft, 111 S Ct 2395, 2399 (1991)

Punitive damages do not constitute a separate cause of action; they are an important means of punishing and deterring misconduct which a state deems particularly unacceptable under its substantive tort law. Morris, *Punitive Damages in Tort Cases*, 46 Harv. L. Rev. 1173, 1177 (1931). The dissent in *Haslip* points out, "Imposed wisely and with restraint, they have the potential to advance legitimate state interests." 111 S. Ct. at 1056. The wisdom and appropriate restraint in their application, Amicus suggests, are the province of the states.

No one would dispute that, for example, Minnesota might view intentional pollution of its lakes as especially reprehensible, or that Arizona might take the same view of fraud against elderly consumers, or California, with respect to habitual drunk drivers. A federal substantive limit on the amount of damages recoverable for such misconduct necessarily undermines these state policy choices. The mathematical limits based on comparisons with compensatory damages, awards in other actions, and awards in other states certainly interfere with a state's ability to punish and deter misconduct through punitive damage awards. So too does the more general proportionality standard under which TXO would have this Court make its own determination of where slander to title falls "on the scale of relative seriousness." Brief of Petitioner at 17.

It is not the role of the Court to announce to the state that, as a matter of constitutional law, it takes the pristine nature of its lakes or the integrity of ownership of its mineral resources too seriously. That concern is properly left to the political process in the states. As this Court recently stated, "The people of Wisconsin may well prefer a [different] system of liability . . . But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment." *DeShaney v. Winnebago County Dept. of Social Services*, 109 S. Ct. 998, 1007 (1989).

2. Substantive Limits Interfere With State Legislative Solutions To Punitive Damages Issues

Does the common law rule place too much power in the hands of jurors? Not only should this question be addressed by state legislatures, rather than by this Court, but nearly every state legislature has done so. Indeed many of the amici who appear in support of TXO in this case, most notably the American Tort Reform Association, are major participants in the tort reform lobby which placed its proposals for limits on punitive damages before nearly every state legislature during 1986-1990. As result of this well-orchestrated and lavishly financed lobbying effort,[7] about 22 states have enacted some elements of the tort reformers' punitive damages agenda. However, only nine have imposed limits on the amounts of punitive awards. *See* American Tort Reform Association, Tort Reform Accomplishments, 1986-1989 18-20 (1989).[8]

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[7]The anxiety-laden rhetoric of the tort reformers' intensely politicized campaign has been compared to the recent marketing tactic known as "slice-of-death" advertising. "Consequently, the current debate over punitive damages has become not a matter of rational discourse, but one of public relations, propaganda, and the mobilization of prejudice and fear. Daniels and Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 13 (Oct. 1990).

The tort reform lobbying effort has been sharply criticized by scholars as an exercise in "raw interest group politics" employing "smokescreens and false alarms." Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141, 1148 & 1164 (1988), and "intentional misrepresentation." Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law.*, 24 Houston L. Rev. 81, 96 (1987). These allegations are of particular concern since those whose rights are "reformed" are, by definition, unknown future victims of tortious misconduct, and therefore politically powerless. *See* Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 Harv. J. on Legis. 143, 189 (1981).

[8]For extensive citation to state statutes affecting punitive damages, See Brief of the Attorney General of West Virginai, as Amicus Curiae.

The tort reform lobby now asks this Court to impose upon the states limits which their legislatures have rejected In fact, ATRA urges this action upon the Court precisely *because* some state legislatures have failed to enact their proposals Brief of American Tort Reform Association at 29

TXO argues eloquently for the primacy of legislative policy judgments in this area Brief of Petitioner at 13 ATLA respectfully suggests that deference to legislative judgments extends not only to those states which have enacted tort reforms, but also to the larger number which have preserved the common law method of assessing punitive damages [9]

D. Substantive limits on punitive damages undermine the role of the jury.

1. Juries Are Competent To Fulfill Their Role As Factfinder With Respect To Punitive Damages.

Much of the argument of TXO and its amici is driven by a deep and cynical distrust of juries Substantive limits must be imposed, the argument runs, because procedural safeguards are inadequate to prevent jurors from acting "solely out of bias and prejudice " Brief of Petitioner at 40

This indictment is leveled against the American people, a cross-section of whom sit on juries daily across the country Into their hands we place the fates of the poor and the powerful Our reliance on their common sense as well as their

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[9]This issue is especially appropriate for the type of experimentation and interstate competition described by Justice O'Connor, *supra* Punitive damage law is self-moderating to the extent that states which become known as too "hard" on business lose the ability to attract and retain businesses Moreover, those arguing for limits are not without access to the political process The array of major corporations, organizations and coalitions appearing as amici in support of Petitoner should itself reassure the Court that the arguments for limiting punitive damages receive a hearing

sense of the conscience of the community, extends even to ultimate decisions of life and death *Witherspoon v. Illinois*, 391 U S 510, 518 (1968)

How wisely do juries exercise this discretion? The largest empirical study of actual jury performance, sponsored by the Roscoe Pound Foundation, found

> Juries overwhelmingly take their duties seriously Juries are evidence-oriented with the personalities of the participants in the trial and other subsidiary matters only of minor concern to them Juries as a group apparently also understand enough of the law that they are able to arrive at legally supportable verdicts in a very large majority of cases The evidence also strongly suggests that jurors rarely increase the size of an award because they think the defendant has ample insurance to cover it, nor do they ordinarily make awards out of sympathy

J Guinther, The Jury in America 102 (1988)

The study concludes that "juries are, on the whole, remarkably adept as triers of fact Virtually every study of them, regardless of research method, has reached that conclusion " *Id.* at 230 *Cf., Duncan v. Louisiana*, 391 U S 145, 157 (1968)("the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them," citing H Kalven and H Zeisel, The American Jury (1966)

ATLA suggests that the decision of West Virginia and other states to allow juries to assess punitive damages without a predetermined limit can scarcely be viewed as irrational

2. Substantive Limits Conflict With The Seventh Amendment Right To Trial By Jury.

The proposal urged by TXO would require judges to reexamine punitive damage verdicts, otherwise supportable under state common-law standards, under a substantive federal constitutional standard to be announced by this Court

The Seventh Amendment to the U.S. Constitution provides:

> In suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend. vii.

Not only does reassessment of a jury's punitive damage verdict appear to conflict with the text of the amendment, there is at least some historical indication that part of the "specific intent" of the Antifederalist proponents of the provision was to preserve the type of broad jury discretion approved in the original punitive damage cases, *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763) and *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763) against encroachment by federal judges. A. Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-60 (1991).

Inasmuch as the Seventh Amendment does not apply to the states, Amicus does not argue that substantive limits on jury awards violate the federal right. It is worth noting, however, that a number of state courts have held that legislative limits on punitive or noneconomic damages violate *state* guarantees of the right to trial by jury. *See, e.g., Moore v. Mobile Infirmary*, 592 So. 2d 156 (Ala. 1991), *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989), *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988). The issue before this Court, however, is whether the Due Process Clause mandates substantive limits on juries. On the question of what process is due, specific constitutional provisions are, at the least, highly indicative. *Haslip*, 111 S. Ct. at 1052-53 (Scalia, J., concurring).

Amicus suggests that substantive limits on punitive damages, contrary to prevailing common law practice and in apparent conflict with the Seventh Amendment, cannot be

deemed so fundamental to the Anglo-American scheme of ordered liberty as to be essential to due process.

III. THIS COURT SHOULD NOT IMPOSE A SET OF SPECIFIC PROCEDURAL REQUIREMENTS GOVERNING PUNITIVE DAMAGE CASES UNDER STATE LAW.

A. Jury Consideration Of The Wealth Of The Wrongdoer Is A Matter Of State Law Rationally Related To Legitimate Objectives.

TXO also contends that it was deprived of procedural due process in this case. Its primary complaint is that the jury was instructed to take into account the assets of the tortfeasor in determining the amount necessary to punish and deter the misconduct. TXO asserts other errors with regard to the jury instructions and the judicial review of the award.[10] Other amici urge this court to adopt a variety of procedural devices to protect defendants. Irrespective of the wisdom of some of these proposals, ATLA submits that they are more properly addressed to the states, rather than to this Court under the Due Process Clause.

The financial condition of the wrongdoer is clearly relevant to a determination of the amount of punitive damages reasonably necessary to punish and deter the wrongdoing. Restatement (Second) of Torts §908, comment e (1977). This Court itself has stated that

> By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, *based on his personal financial resources*, [42 U.S.C. §1983] directly advances the public's interest in preventing repeated constitutional deprivations.

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[10]To the extent that many of these contentions are limited to the circumstances of this case, Amicus will not add to the arguments ably advanced in the Brief of Respondents.

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270 (1981)(emphasis added).

The Alabama scheme which this Court found compatible with due process included consideration of the "financial condition" of the tortfeasor. *Haslip* at 1045. Although evidence of wealth carries some potential for prejudice, "an increasing majority of jurisdictions allow evidence of the defendant's wealth to be presented to the jury." L. Schlueter and K. Redden, Punitive Damages §5.3(F)(2d ed. 1989). *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981)("evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded.") Indeed the dissent in *Haslip* would *require* that juries be instructed that the defendant's financial in relevant. 111 S. Ct. at 1061 (O'Connor, J., dissenting).

West Virginia has long followed this practice. *Pendleton v. Norfolk & W. R. Co.*, 95 S.E. 941 (W. Va. 1918). The relationship between this evidence and the purposes of punitive damages was recently and succinctly enunciated by Justice Neely for the West Virginia Supreme Court of Appeals. "Jeff's Hot Dog Stand, which serves a local neighborhood, will be affected more strongly by a $20,000 punitive damages award than will McDonald's." *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991). ATLA submits that this state rule satisfied due process under the same standard this Court applied to Alabama's rule imposing vicarious liability on corporations for the acts of agents. *Haslip*, 111 S. Ct. at 1032 ("We cannot say that this does not rationally advance the state's interest . . .")

B. Procedural Due Process does not require this Court to establish a detailed scheme governing civil cases.

This Court need not address the various procedural safeguards urged upon it by TXO and its supporting amici. Not every improvement to the justice system, however wise or sensible, is thereby essential to fundamental fairness.

Every litigant in a civil case, plaintiff or defendant, is entitled to due process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982). In contrast to its criminal procedural mandates, this Court has delineated the process which is due in civil lawsuits in only broad and elemental strokes. In civil actions, due process is satisfied by "traditional notions of fair play and substantial justice." *Burnham v. Superior Court*, 495 U.S. 604 (1990), including notice, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), a meaningful pre-deprivation opportunity to be heard, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985), and a neutral decisionmaker, *Tumey v. Ohio*, 273 U.S. 510 (1927).

This Court has admonished that the Fourteenth Amendment does not impose "a rigid constitutional code of procedural necessities," *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 326 (1985). "There is no requirement as to exactly what procedures to employ whenever a traditional judicial-type hearing is mandated." *Parham v. J.R.*, 442 U.S. 584, 608 n.16 (1979). This Court has consistently "rejected reasoning that 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" *Daniels v. Williams*, 474 U.S. 327, 332 (1986), quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976).

The Court did not depart from these principles in *Haslip*. The Court held "the traditional common-law approach," of assessing punitive damages, in view of its longstanding acceptance by this Court and "every state and federal court that has considered the question" does not violate due process. 111 S. Ct. at 1043.

The Court then reviewed the detailed requirements established by Alabama for punitive damage claims and concluded that Pacific Mutual "had the benefit of the full panoply of Alabama's procedural protections. Id. at 1046. It is plain, though perhaps not explicit, that the Court described

the Alabama procedures as illustrative of a scheme which complies with due process. In addition, Alabama having adopted these safeguards, Pacific Mutual was entitled to compliance. The Court nowhere indicated that any of these specific procedures were essential to due process. *Cf.* 109 S. Ct. at 1047 (Scalia, J. concurring)(the majority opinion offers "no guidance" as to the constitutionality of other procedures).

The Due Process Clause is not "a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512 (1885).

At the very heart of the arguments of TXO and the tort reform amici is a myth: The lawless jury. Two centuries of jurisprudence and extensive recent empirical research flatly contradict the reformers' dark and cynical portrait of our civil justice system. Nevertheless, they urge this Court to cast away guiding principles of due process, federalism, and the common law tradition. The myth is wrong. Due process of law finds no higher expression than in the independent civil jury.

CONCLUSION

For these reasons, ATLA urges this Court to affirm the judgment of the Supreme Court of Appeals of West Virginia.

Respectfully submitted.

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